

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE DEPARTMENT)	
OF TRANSPORTATION (DELDOT))	C.A. No. 04A-03-003 JTV
)
Appellant/Employer,)	
)
v.)	
)
PATRICIA DEENEY,)	
)
Appellant/Grievant.)	

Submitted: February 8, 2005

Decided: June 23, 2005

Ilona Kirshon, Esq., Department of Justice, Wilmington, Delaware. Attorney for the Appellee.

Roy S. Shields, Esq., Brown, Shields, Beauregard & Chasanov, Dover, Delaware. Attorney for Appellant.

Upon Consideration of Appellee's Appeal
From Decision of the Merit Employee Relations Board
REVERSED & REMANDED

VAUGHN, President Judge

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OPINION

The State of Delaware Department of Transportation ("DELDOT" or "the State") appeals from a decision of the Merit Employee Relations Board ("the Board" or "MERB"). The Board found that Patricia Deeney ("Ms. Deeney" or "the employee") was terminated from her employment with DELDOT without just cause and ordered that she be returned to her position or a comparable position. The Board also granted an award of back pay. Only one issue is presented on appeal: Should unemployment compensation which the employee received during the period covered by the back pay award be deducted from that award? The Board concluded it should not and that the full amount of back pay should be paid without any offset or reduction for the employee's unemployment compensation. I conclude, however, that since unemployment compensation and the MERB's back pay award emanate from the same employer (the State of Delaware), DELDOT is entitled to an offset against the back pay award for the unemployment compensation paid to Ms. Deeney.

FACTS

Only a brief recitation of the facts is necessary. Ms. Deeney was terminated from her employment at the Department of Motor Vehicles on June 27, 2002.¹ She exercised her statutory right, as a Merit Employee,² to appeal her termination to the MERB. The Board held hearings on June 5, 2003 and June 25, 2003 and found she

¹ The Department of Motor Vehicle now falls under the umbrella of DELDOT, but at the time Ms. Deeney was terminated it was a part of the Department of Public Safety.

² 29 Del. C. § 5901 *et seq.*

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had been terminated without just cause and that back wages should be awarded. The Board then considered whether unemployment compensation paid to Ms. Deeney in the amount of \$10,759, after she was terminated, should be deducted from the back pay award.

In reaching its decision, dated February 23, 2004, that the unemployment compensation should not be deducted from the back pay award, the Board relied upon the Delaware case of *Crisco v. Bd. of Educ. Of the Indian River Sch. Dist.*,³ certain cases from other jurisdictions, and Merit Rule 20.10. That rule reads as follows:

If an employee grievance is upheld . . . retroactive remedies shall apply to the Grievant only and, for a continuing claim, be limited to 30 calendar days prior to the date the grievance was filed. Any financial settlement shall be reduced by the amount of the Grievant's earnings during the period covered by the settlement regardless of source, excluding part-time income which was received prior to the separation.

The Board concluded that unemployment compensation is not earnings and that under its rule, therefore, it should not be deducted from the award. It also concluded that the above-mentioned cases support the view that unemployment compensation should not be deducted from a back pay award such as the one involved here. The Board noted that the State, through the Department of Labor ("DOL"), could recoup the benefits under 19 *Del. C.* § 3325.

³ 1988 Del. Ch. LEXIS 120.

STANDARD OF REVIEW

The scope of review for appeal of a board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.⁴ "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁵ On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."⁶ The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.⁷ The court's review of questions of law on appeal is *de novo*.⁸

DISCUSSION

Under 19 Del. C. § 3345(b)(1), DELDOT, as a "liable public employer," is obligated to reimburse the state's unemployment fund the full amount of the \$10,759 of unemployment compensation paid to Ms. Deeney, dollar for dollar. If it pays her the full amount of her back wages and DOL does not recoup Ms. Deeney's

⁴ *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264.

⁵ *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960). *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *Regis v. Daimler Chrysler Corp.*, 2005 Del. LEXIS 74, *at 3.

⁶ *Johnson*, 213 A.2d at 66.

⁷ *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3.

⁸ *In re Beattie*, 180 A.2d 741, 744 (Del. Super. Ct. 1962).

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unemployment compensation, DELDOT is therefore exposed to double liability and Ms. Deeney receives a double recovery. ←

Recoupment of overpayments of unemployment compensation is addressed in 19 *Del C.* § 3325. The statute gives DOL administrative discretion as to how benefits can be recouped. Benefits ultimately determined not to be due may be recouped "either by cash or by deduction from subsequently awarded benefits, or by any other means." The exercise of discretion by DOL in the manner of recouping benefits is not subject to judicial review. I do not read the statute, however, as authorizing DOL simply to waive recoupment of benefits. Ms. Deeney readily and appropriately agrees that the unemployment compensation which she received can be recouped by DOL. ←

As to the manner of recoupment, over which DOL has discretion, I see nothing in this record from which it could be inferred that Ms. Deeney will become entitled to subsequently awarded benefits. Thus, there is no reason to believe that recoupment from subsequently awarded benefits is a reasonable possibility. Further, on the record of this case, recoupment by any means other than recoupment from the employee's back pay award appears to be purely hypothetical. DOL is authorized to write off an overpayment after three years if it is deemed to be uncollectible, but if Ms. Deeney is awarded the full amount of her back pay and her unemployment compensation is not recouped, uncollectibility can occur only after double payment to her has become an accomplished fact.

Under these circumstances, I conclude that the unemployment compensation

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paid to Ms. Deeney should be offset against the back pay award under the principle that an employee cannot have a double recovery where both sources of recovery emanate from the same source, in this case, the State of Delaware. This limitation upon the collateral source rule is well established and has been recognized by numerous authorities in this State.⁹ DELDOT should not be required to rely upon DOL's recoupment procedure, and bear the risk that through administrative error or oversight recoupment will not occur.

In *Crisco*, a school teacher who was not rehired at the end of a school year sought reinstatement and back pay. The Court of Chancery ruled that the school district acted improperly and granted the relief sought by Ms. Crisco. It also ruled that her back pay award would not be reduced or offset by unemployment benefits. It relied, in part, upon two Third Circuit Court of Appeals cases, *Craig v. Y & Y*

⁹ *Johnson v. Dunkle*, 541 A.2d 551 (Del. 1988)(holding the employee was not permitted to secure recovery of workers' compensation benefits for medical expenses when those expenses were already paid by medical insurance funded solely by the employer); *Raylea v. KF Environmental Tech*, 2005 Del. Super. LEXIS 91 ("An employee cannot secure double recovery for a single loss where both sources of recovery emanate from the employer."); *State v. Brown*, 2000 Del. Super. LEXIS 491 (declining to allow double recovery when the employee was awarded total disability worker's compensation benefits for a time period where he has already been paid his full wages). See *Brooks v. Chrysler*, 405 A.2d 141 (Del. Super. Ct. 1979)(requiring offset where the employee was attempting to recover disability workers' compensation benefits and unemployment benefits). Compare with *State v. Calhoun*, 634 A.2d 335 (Del. 1993)(offset was not required where one of the benefits was pension payments based on the worker's own contributions to the pension plan, thus implicating the collateral source rule).

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*Snack, Inc.*¹⁰ and *Gelof v. Papineau*.¹¹ These cases involved claims of discrimination arising under the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. Both cases held that unemployment benefits would not be deducted from federal court awards made to the plaintiffs. It appears that the decisions in those cases were influenced by factors relevant to federal anti-discrimination law, factors which are not present here. In addition, the *Gelof* decision notes that Delaware had no provision for recoupment of the unemployment benefits paid to the plaintiff in that case, whereas here the unemployment benefits are subject to recoupment.¹² For these reasons, I find that *Craig* and *Gelof* are distinguishable from this case, which involves only state law.

The other authorities relied upon in *Crisco* are not Delaware authorities and I am not persuaded that they outweigh the collateral source rule upon which I rely.

Finally, the collateral source rule and its limitations are not discussed in *Crisco*. For these reasons, I decline to follow *Crisco*.

I take no issue with the Board's interpretation of its own rule. The limitation on the collateral source rule which forms the basis for my opinion is separate and apart from the Board's rule.

¹⁰ 721 F.2d 77 (3rd Cir. 1983).

¹¹ 829 F.2d 452 (3rd Cir. 1987).

¹² This apparent inconsistency between the law regarding recoupment in effect at the time of the *Gelof* decision may be explained by amendments to the recoupment statute. 19 Del. C. § 3325, 65 Del. Laws c. 179, sec. 2 (1986); 65 Del. Laws c. 367, sec. 2 (1986).

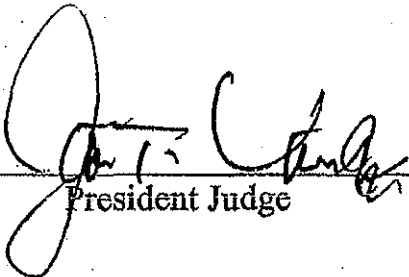
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For the foregoing reasons, the Board's decision of February 23, 2004 that Ms. Deeney's back pay award not be reduced by the amount of her unemployment benefits is *reversed*, and the case is *remanded* to the Board for any further proceedings consistent with this decision which may be necessary, if any.

IT IS SO ORDERED.



President Judge

oc: Prothonotary
cc: Order Distribution
File